



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 29, 1995

Ms. Dealey Herndon
Executive Director
State Preservation Board
P.O. Box 13286
Austin, Texas 78711

OR95-1611

Dear Ms. Herndon:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 31506.

The State Preservation Board (the "board") received two separate open records requests from a representative of SAE/Spaw-Glass, Inc., which is the general contractor on the Capitol Interior Preservation Project. Specifically, the requestor seeks the following records: 1) the resumes of eighteen current or former board employees; and 2) records related to change orders and time extensions on two board projects that did not involve Spaw-Glass.

You have informed the requestor that the board does not require its employees to present resumes during its hiring process, but rather requests that they complete a state application form, samples of which you have submitted to this office for review.¹ You contend that all of the requested information is excepted from required public disclosure by section 552.103 of the Government Code. Alternatively, you suggest that portions of the job applications may come under the protection of section 552.102 and that portions of the change order and time extension documents may be withheld pursuant to section 552.110 of the Government Code.

Because section 552.103 is the more inclusive exception, we will discuss it first. Section 552.103(a) of the Government Code, known as the litigation exception, excepts from required public disclosure information

¹Although you informed the requestor that some of the information he seeks is also contained in the employees' performance evaluations, the requestor has informed a member of this office in a telephone conversation that he is not interested in obtaining copies of those documents.

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

This exception authorizes governmental bodies to withhold information that relates to pending or "reasonably anticipated" litigation involving a governmental entity or its officers or employees, *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.), as well as information that relates to settlement negotiations involving such litigation, Open Records Decision No. 511 (1988) at 2.

To secure the protection of section 552.103(a), a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation. Open Records Decision No. 588 (1991) at 1. The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 (1986) at 4 (and authorities cited therein). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.*

You have made no tangible argument as to how the requested job applications relate to any pending or reasonably anticipated litigation. On the other hand, you contend that section 552.103 protects the records pertaining to change orders and time extensions because

Spaw-Glass and [the board] are currently negotiating and settling a number of claims arising from the Interior Project, the largest of which relates to information sought in the open records request. . . .

A literal reading of this section indicates that the requested information would be excepted from disclosure because the request specifically references comments made in a claim review hearing² and in claim negotiations which are part of an ongoing settlement process on this project. . . .

I have discussed this matter with the Assistant Attorney General who represents the [board] on this project . . . and he agrees that release of

²Because you do not argue that the "claim review hearing" constitutes "litigation," *see, e.g.*, Open Records Decision No. 588 (1991) (contested case before administrative agency), we conclude that you have not met your burden in establishing that that proceeding constitutes "litigation" for purposes of section 552.103.

this information could hinder settlement negotiations or future defense of these claims in a lawsuit should the negotiations fail.

We have considered your arguments and reviewed the documents at issue. Based on the circumstances surrounding the request as you have described them, we cannot conclude that you have established that litigation is likely to arise from the settlement negotiations. For example, none of the records you have submitted to this office contain any suggestion that Spaw-Glass is considering filing suit against the board in the event the negotiations are unsuccessful.³ Nor have you made any comment as to whether you believe that the current negotiations will not end in a settlement. Because you have not demonstrated that litigation is reasonably anticipated, we conclude that you have not met your burden in establishing the applicability of section 552.103. Accordingly, the board may not withhold any of the requested information pursuant to this exception.

As noted above, however, you also contend that portions of the job applications come under the protection of section 552.102 of the Government Code. Section 552.102(a) protects "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" Section 552.102 is designed to protect public employees' personal privacy. The scope of section 552.102 protection, however, is very narrow. *See* Open Records Decision No. 336 (1982); *see also* Attorney General Opinion JM-36 (1983). The test for section 552.102 protection is the same as that for information protected by common-law privacy under section 552.101: the information must contain highly intimate or embarrassing facts about a person's *private* affairs such that its release would be highly objectionable to a reasonable person *and* the information must be of no legitimate concern to the public. *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App.-Austin 1983, writ ref'd n.r.e.).

In Open Records Decision No. 455 (1987), this office concluded that each of the following categories of information have a direct bearing on an applicant's suitability for public employment and thus are *not* protected by either common-law or constitutional privacy: applicants' educational training; names and addresses of former employers; dates of employment; kind of work performed, salary, and reasons for leaving; names, occupations, addresses, and phone numbers of character references; job performances or abilities; birth dates, height and weight, and marital status. After reviewing the sample of job applications you submitted to this office, we could discern no information that implicates the board employees' privacy interests. Because you have raised no other exception to disclosure that protects these records, the board must release the job applications.⁴

³In this regard we note that you did not inform this office, and thus we could not consider, the dollar amount in controversy.

⁴We note, however, that to the extent that the employees or former employees have elected to make their respective home address and telephone number confidential in accordance with section 552.024 of the Government Code, the board must withhold this information pursuant to section 552.117(1)(A).

Finally, we address your concerns regard section 552.110 of the Government Code, which protects from public disclosure:

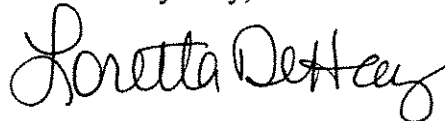
[A] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.

Because the purpose of section 552.110 is to protect the property interests of third parties, it is the practice of this office to notify those parties of open records requests for their records. Accordingly, this office notified representatives of Constructors & Associates, Inc. and Stoddard Construction that we received your request for an open records decision regarding the records pertaining to the change orders and time extensions. In our letter to those companies, this office requested an explanation as to why portions of the records at issue were excepted from public disclosure, with the caveat that failure to respond within a reasonable time would result in this office instructing you to disclose the information.

More than eight months have elapsed since this office issued its notices, but neither company has provided this office with any explanation as to why the requested documents should not be released. Consequently, we have no basis for applying section 552.110 to these records. *See* Open Records Decision Nos. 592 (1991) (concluding that section 552.110 excepts from disclosure commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision), 402 (1988) (concluding that when a governmental body or company fail to provide any evidence of the factors necessary to establish a trade secret claim, this office cannot conclude that the trade secret prong of section 552.110 applies). Because neither the companies nor the board has established the applicability of section 552.110, we must conclude that these records do not contain confidential trade secret or commercial or financial information. You therefore must release these records at this time.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Loretta R. DeHay
Assistant Attorney General
Open Records Division

Ref.: ID# 31506

Enclosures: Marked documents

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